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## RECENT ACTIVITY BY THE SENTENCING COMMISSION

By Richard B. Zabel and James J. Benjamin, Jr.<sup>1</sup>

*Akin, Gump, Strauss, Hauer & Feld, L.L.P.*

Over the past several months, in a burst of activity, the United States Sentencing Commission has issued an outpouring of amendments and proposed amendments to the sentencing guidelines. These new provisions have come on the heels of a lengthy period of inactivity during which the commission was hamstrung, without a quorum, because of unfilled vacancies in its membership.<sup>2</sup> During that time, circuit conflicts went unresolved and Congress imposed new mandates on the commission.

With a full slate of members, the commission has now moved aggressively to address many unresolved issues on its docket. On November 1, 2000, a flurry of amendments — fifteen in all — became effective.<sup>3</sup> Additional amendments were announced, on an emergency basis, in December 2000, February 2001, and March 2001.<sup>4</sup> Finally, in November 2000 and January 2001, the commission issued a large assortment of proposed amendments, including fundamental changes to the guidelines for economic crimes such as theft and fraud.

Although a few of the new provisions are technical, many of them reflect important substantive changes. In addition, because some of the amendments were prompted by new anti-crime legislation, they may be indicators of areas of more intensive activity for law enforcement, as well as emerging areas of crime to which the law is adapting. Although the fate of the proposed amendments is uncertain, some of them — particularly the commission's "Economic Crimes Package" issued in January 2001 — carry the potential for significant change in the treatment of many white-collar offenses.

This article provides a brief analysis of some of the more significant recent amendments and proposed amendments. The full text of the relevant materials is available on the commission's website, [www.ussc.gov](http://www.ussc.gov).

### I. The November 2000 Amendments

**Procedure for selecting the applicable guideline (Amendment 591).** In attempting to calculate the sentencing guidelines range for any particular case, the first task — and the most fundamental — is to determine the applicable guideline. The choice of a guideline is not always intuitively obvious. For example, if a defendant is convicted of drug-trafficking, but the evidence at trial showed that he wounded a rival during a gun battle arising from his drug business, which guideline should be applied: the narcotics guideline, U.S.S.G. § 2D1.1, or the aggravated assault guideline, U.S.S.G. § 2A2.2? When it created the Guidelines in the 1980s, the commission determined, as a matter of policy, that the applicable guideline should be based on the offense of conviction that is set forth in the charging instrument, rather than the defendant's "real" criminal conduct.<sup>5</sup> Thus, in the example set forth above, the narcotics guideline is applicable, not the aggravated assault guideline. To carry out its mandate of modified "charge offense" sentencing, the commission created Appendix A to the guidelines. Appendix A is a comprehensive table which lists virtually all federal criminal statutes, and then lists one or more corresponding guidelines for each statute. In most cases, Appendix A provides an easy method for finding the applicable guideline: one simply consults the appendix, finds the relevant statute of conviction, and follows the table to determine the applicable guideline.

Until the recent amendments, however, this seemingly mechanical system had an escape hatch for "atypical" cases. In such cases, where the court concluded that the guideline listed in Appendix A was "inappropriate," it was permitted to deviate from the appendix and pick out another, more apt, guideline section.<sup>6</sup> Courts sometimes invoked this provision to impose a harsher guideline based on the defendant's "real" offense conduct, notwithstanding the commission's overarching policy of modified "charge offense"

sentencing. For example, in *United States v. Elefant*, an FBI translator who disclosed a wiretap was convicted of theft of government property. Under Appendix A, this offense would have required application of the theft guideline, U.S.S.G. § 2B1.1, but the court applied the more stringent obstruction of justice guideline, U.S.S.G. § 2J1.2, even though that guideline was not listed in Appendix A as being authorized for such cases.<sup>7</sup> In *Elefant* and similar cases, courts struggled to define the boundaries of their authority to deviate from the appendix.<sup>8</sup>

In the November 2000 amendments, the commission eliminated, as a general matter, a court's authority to deviate from Appendix A.<sup>9</sup> Thus, courts are now generally required to follow the mechanical process of consulting Appendix A in order to determine the applicable guideline. This amendment is consistent with the modified "charge offense" philosophy which undergirds the guidelines. In addition, it promises to simplify the sentencing process, and to reduce the risk of error in the fundamental decision of which guideline to apply, by eliminating what had been a somewhat confusing area of judicial discretion.

Under the new amendments, there are only two exceptions to the general requirement that courts must apply the guideline listed in Appendix A. First, if the parties stipulate that a more severe guideline should be applied, the court must adopt that guideline, even if it is not listed in Appendix A.<sup>10</sup> Second, the amendments did not eliminate specific provisions, embedded in particular guidelines, which permit selection of a guideline not listed in Appendix A in certain limited circumstances. One such provision is Application Note 14 to the fraud guideline, U.S.S.G. § 2F1.1.<sup>11</sup>

The Sentencing Commission took the unusual step of declaring that this amendment is retroactive.<sup>12</sup> Because of this determination, defendants who were previously sentenced based on a guideline not listed in Appendix A, and who received a higher sentence because of the deviation, may be permitted to petition the court for a sentence reduction.<sup>13</sup>

**Use of uncharged or dismissed conduct to impose an upward departure (Amendment 604).** Under the guidelines, plea agreements often contain elaborate stipulations under which the parties agree on a particular sentencing range. Although such stipulations are not binding on the court,<sup>14</sup> in practice they often receive deference from judges and, less frequently, from the Probation Office when it prepares its guidelines calculations in the presentence investigation report.

In negotiating plea agreements, prosecutors sometimes elect to forego upward adjustments which might otherwise be applicable. Such prosecutorial flexibility typically arises when the proof relating to a guidelines adjustment is questionable, or when the government wishes, for any number of reasons, to resolve a case speedily. For example, in the drug-trafficking hypothetical mentioned above, a prosecutor might be willing to accept a plea bargain which does not incorporate any upward adjustment for the shooting, either because the evidence of the shooting is weak,

because it depends on an informant whom the prosecutor does not wish to reveal, or because it has not yet been fully developed and the prosecutor wishes to wrap up the case in order to move on to other, more pressing investigations.

When the government elects to forego certain offense conduct in a plea agreement, can the court nevertheless rely on that conduct as a basis for an upward departure? Until the recent amendments, there was a split in the circuits on this question. One group of courts, led by the Second and Third Circuits, held that courts were permitted to rely on dismissed or uncharged conduct in imposing an upward departure; another faction, led by the Ninth Circuit, reached the contrary conclusion in cases involving plea agreements.<sup>15</sup> The Ninth Circuit and its adherents emphasized the need to give effect to the parties' reasonable expectations when entering into a plea bargain.<sup>16</sup>

In its recent amendments, the Sentencing Commission rejected the Ninth Circuit's view. The commission added a new policy statement, U.S.S.G. § 5K2.21, which explicitly permits the court to sentence a defendant above the guideline range based on conduct that was dismissed as part of a plea agreement.<sup>17</sup> In explaining this amendment, the commission did not meaningfully address the Ninth Circuit's concerns about protecting the integrity of plea bargaining. Rather, the commission emphasized the court's authority to impose sentence based on all of the information that is available to it.<sup>18</sup>

We believe that, in most cases, courts are unlikely to impose an upward departure based on conduct which the government has dismissed as part of a plea agreement. The government, of course, is required to abide by its plea agreement, and in our experience it is unusual for a court to impose a harsher sentence than the government is advocating (although judges may respond to what they perceive as undue governmental leniency by imposing sentence at the top of the range). Nevertheless, the risk of an unanticipated *sua sponte* upward departure may create some uncertainty in plea bargaining, especially where defense counsel has secured unusually favorable stipulations from the government. In order to cure this uncertainty, defense counsel might seek plea agreements under Fed. R. Crim. P. 11(e)(1)(C). Prosecutors have often been reluctant to enter into such agreements, because of the view that they intrude too far upon the court's sentencing function. Recent amendments to Rule 11(e)(1)(C), however, might make such agreements more palatable to prosecutors and judges. Whereas previously under Rule 11(e)(1)(C) the parties stipulated to a specific *sentence* that was binding on the court, the amended rule allows the parties to agree upon a sentencing *range*, or to agree that a particular guidelines *provision* is either applicable or inapplicable. As under prior practice, the court is then required to either accept or reject the parties' plea agreement; in the case of rejection, the defendant has the right to withdraw his plea.<sup>19</sup>

A plea agreement under Rule 11(e)(1)(C) would afford protection against unforeseen upward departures based on dismissed conduct. Alternatively, in order to avoid such departures, defense

counsel might seek to confirm from the government, either formally or informally, that a particular adjustment is inapplicable because of inadequate evidence, meaning that the court would find it difficult to justify an upward departure in any event.

**Downward departures for aberrant behavior (Amendment 603).**

In the introduction to the original version of the guidelines manual, the commission outlined its view that courts had traditionally treated certain white-collar first offenders too leniently, often imposing probation when, in the commission's view, a prison sentence was appropriate.<sup>20</sup> The commission explained that it sought to rectify this problem by drafting the guidelines to ensure that many white-collar offenders would face at least a short period of incarceration, even if they lacked any prior criminal record. At the conclusion of this discussion, the commission added, somewhat cryptically, that it had not "dealt with the single acts of aberrant behavior that still may justify probation at higher offense levels through departures."<sup>21</sup>

Not surprisingly, defense lawyers quickly latched onto the commission's proviso and motions for "aberrant behavior" departures became commonplace, especially in white-collar cases involving first offenders. In the absence of any guidance from the commission beyond the single sentence quoted above, courts adopted conflicting approaches to aberrant-behavior motions. One group of courts, led by the Seventh Circuit, adopted a very narrow view, under which a departure would be available only if the defendant committed a "spontaneous and seemingly thoughtless act" that required little or no planning. Other courts, led by the Ninth Circuit, adopted a broader totality of the circumstances test, which examined the spontaneity and planning inherent in the offense, but also looked to other factors, including the defendant's criminal record, psychological condition, life circumstances, and motives for committing the crime, as well as mitigating circumstances such as the defendant's charitable activities and prior good deeds.<sup>22</sup>

In the recent amendments, the commission resolved the circuit split by issuing a new policy statement, U.S.S.G. § 5K2.20. This provision works a number of changes in the law. First, the new provision imposes a series of threshold requirements that must be satisfied before a defendant can qualify for a departure on grounds of aberrant behavior. Such departures are now prohibited in cases involving drug-trafficking or serious violence, or if the defendant used a gun, has more than one criminal history point, or has a prior felony conviction.<sup>23</sup> Next, the new policy statement spells out, in some detail, the criteria to be applied in deciding whether an eligible defendant should receive an aberrant-conduct departure. Here, the commission attempted to chart a middle course between the two conflicting approaches in the pre-existing case law. The commentary defines "aberrant behavior" as a single occurrence or transaction that was committed without planning, was of limited duration, and represented "a marked deviation from an otherwise law-abiding life." The commentary then states that, in determining whether a departure is warranted, a court may consider many of

the factors previously recognized in the totality-of-the-circumstances circuits.<sup>24</sup>

In our experience, departures for aberrant behavior have been among the more difficult for prosecutors to address. The totality-of-the-circumstances test invited consideration of a broad array of facts and circumstances, provided they were somehow probative of the aberrant nature of the defendant's criminal conduct. Despite the commission's criticism of this standard as "overly broad and vague,"<sup>25</sup> it is noteworthy that the new policy statement retains many of the open-ended factors which had informed the analysis under the totality-of-the-circumstances test. Thus, absent further development in the case law, it is unclear whether the new policy statement will significantly alter the frequency with which aberrant-conduct departures are granted. It seems certain, however, that defense attorneys will continue to push for such departures, either alone or in combination with other arguments.

As a final note, for cases in which the offense conduct occurred before November 1, 2000, there is a question whether application of the new § 5K2.20 would be barred, in former totality-of-the-circumstances jurisdictions, by *ex post facto* considerations. To the extent that the new provision imposes a stricter standard than the totality-of-the-circumstances test, it may be prudent for practitioners to ask a sentencing court to make alternative findings under both the old and new standards.

**Downward departures for post-sentencing rehabilitation (Amendment 602).**

One of the more controversial aspects of the Sentencing Reform Act was its conclusion that prison sentences should not be imposed for the purpose of rehabilitation.<sup>26</sup> Even under the guidelines, however, rehabilitation continues to be relevant to the sentencing process. As one important example, courts have uniformly held that a downward departure may be warranted where a defendant undertakes exceptional rehabilitative efforts — such as demonstrated efforts to stop using drugs, get a job, support one's family, and the like — prior to the imposition of sentence.<sup>27</sup> A more difficult question arises when a defendant is sentenced to imprisonment, begins serving his sentence, and then prevails on appeal or in a post-conviction motion. When the case is sent back to the district court for re-sentencing, should the judge consider the defendant's efforts to rehabilitate himself in prison? If the defendant has made exceptional efforts, can the judge impose a downward departure?

Until the recent amendments, there was a lopsided circuit split on this issue. The vast majority of circuits held that a court was free to impose a downward departure based on a defendant's extraordinary rehabilitation while in prison.<sup>28</sup> Standing by itself, however, the Eighth Circuit reached the opposite conclusion.<sup>29</sup> In the Eighth Circuit's view, it was unfair to allow this type of departure, since only a handful of defendants are re-sentenced and they should not get an unfair advantage as compared to all other defendants. The Eighth Circuit also noted that a federal sentencing statute grants the Bureau of Prisons exclusive authority to award "good time" credits based on a defendant's conduct in prison. As

the Eighth Circuit pointed out, the BOP considers many of the same factors typically cited as justifying a downward departure, and permitting courts to award downward departures might be viewed as interference with the BOP's statutory power.<sup>30</sup>

In the recent amendments, the Sentencing Commission adopted the Eighth Circuit's view.<sup>31</sup> The commission added a new policy statement, U.S.S.G. § 5K2.19, which prohibits downward departures based on post-sentencing rehabilitation. (The policy statement notes, however, that post-sentencing rehabilitation might provide a basis for early termination of supervised release.) This policy statement overturns the settled law of many circuits, and takes away one benefit that some defendants had previously achieved from filing a successful appeal or U.S.S.G. § 2255 motion. As the commission made clear, however, exceptional rehabilitation between the time of the offense and the time of the original sentencing continues to be a valid basis for departure.<sup>32</sup>

**Increased penalties for criminal infringement of copyright or trademark (Amendment 593).** Infringement of copyrights, trademarks, and other forms of intellectual property is commonly associated with private, civil enforcement. For a number of years, however, federal law has provided criminal penalties for persons who willfully infringe copyrights and trademarks for profit.<sup>33</sup> When it created the guidelines, the Sentencing Commission drafted a special guideline, U.S.S.G. § 2B5.3, for intellectual property crimes. Until the recent amendments, this guideline provided a base offense level of six, with incremental increases based on the retail value of the *infringing* items. Thus, for example, if a defendant was convicted of trafficking in 500 fake "Rolex" watches to be sold in Times Square for \$20 apiece, the guidelines calculations would be keyed to the retail value of the phony merchandise (*i.e.*,  $500 \times \$20 = \$10,000$ ), as opposed to the far higher retail value of 500 genuine Rolexes.

In a 1997 statute, the No Electronic Theft Act or NET Act, Congress expressed its view that the intellectual property guideline should be "sufficiently stringent to deter" such crimes and, more specifically, directed the commission to incorporate some consideration of the retail value of the *infringed* items (in the example above, genuine Rolex watches) in the applicable guideline.<sup>34</sup> In response, after a thorough study, the commission issued a recent amendment that completely rewrites U.S.S.G. § 2B5.3.<sup>35</sup>

Under the newly-amended § 2B5.3, the base offense level is now eight — a two level increase from the prior guideline. Moreover, although the guideline retains a sliding scale of upward adjustments depending on the financial effects of the crime, the guideline has been substantially changed, consistent with the NET Act, so that the loss amount is now calculated, in many scenarios, based on the retail value of the infringed item.<sup>36</sup> For example, if the infringing item is a digital or electronic copy of the protected item (*e.g.*, illegally copied computer software), or if the infringing item appears to be substantially equivalent in quality to the protected item, then the loss calculation is keyed to retail value of the infringed item. According to the commission, the amendment

more accurately reflects the harm to the copyright-holder in cases involving high-quality infringements, since purchasers of such items would, absent the infringement, be likely to purchase the genuine articles. By contrast, where the infringing item is an obviously inferior knock-off, such as a phony Rolex sold on the street, the guideline calculation continues to depend on the value of the infringing items.<sup>37</sup> In addition, the new guideline incorporates an extra two-level upward adjustment in cases involving the manufacture, importation, or uploading onto the Internet of infringing items.<sup>38</sup> According to the commission's data, this adjustment is expected to apply in about two-thirds of all criminal intellectual property cases.<sup>39</sup> Finally, a new application note encourages upward adjustments for abuse of special skills if the defendant circumvented technological security measures in order to gain access to an infringed item.<sup>40</sup>

As a percentage of federal criminal cases nationwide, prosecutors have brought relatively few criminal intellectual property cases in recent years. Nevertheless, officials of the Sentencing Commission noted a 28% increase in the number of such cases between 1996 and 1998.<sup>41</sup> In addition, the NET Act expanded the scope of criminal copyright liability under 17 U.S.C. § 506, so that persons who willfully disseminate copyrighted material over the Internet can now be prosecuted criminally, even if they lacked any financial motive.<sup>42</sup> Thus, given the increasing number of cases, and the fairly recent expansion of a key statute in this area, it seems possible that the stiffening of penalties under U.S.S.G. § 2B5.3 will correspond to increased enforcement by the Department of Justice.

**Increased penalties for crimes involving "identity theft" (Amendment 596).** In 1998, in an effort to combat so-called "identity theft," Congress enacted the Identity Theft and Assumption Deterrence Act of 1998.<sup>43</sup> The ITADA makes it a crime to transfer or use another person's "means of identification" with intent to commit a federal or state offense. "Means of identification," in turn, is defined broadly to include a variety of items, such as person's name, date of birth, Social Security number, fingerprints, biographical data, PIN numbers, and the like.<sup>44</sup> The statute thus covers not only familiar economic crimes, such as using another person's credit card to incur unauthorized charges, but a vast array of criminal conduct already penalized under other statutes, such as presenting a false passport in someone else's name to gain entry into the United States or using a stolen Social Security number to obtain an unauthorized tax refund. According to a Sentencing Commission study, the offense conduct of some 180 federal criminal statutes can potentially involve the misuse of someone's means of identification, thereby falling within the ambit of the ITADA.<sup>45</sup>

As part of the ITADA, Congress directed the Sentencing Commission to amend the guidelines to provide appropriate penalties for identity theft. Among other things, Congress instructed the commission to consider the non-economic harm to victims of identity theft, including damage to reputation and inconven-

ience that can occur when a criminal takes over a person's identity.<sup>46</sup> In response to this directive and a related instruction in another recent federal statute,<sup>47</sup> the commission drafted a new subsection to the fraud guideline.<sup>48</sup> This new subsection, U.S.S.G. § 2F1.1(b)(5), requires a two-level upward adjustment (and a minimum offense level of 12) in cases involving "breeding" of false identification means — that is, using existing means of identification, such as another person's name and Social Security number, to obtain an entirely new means of identification, such as a credit card or bank loan in the same victim's name.<sup>49</sup> The commission explained that this provision is intended to apply to "the more aggravated and sophisticated forms of identity theft" — namely "breeding" — about which Congress was primarily concerned in enacting the ITADA.<sup>50</sup>

In its recent amendments, the Sentencing Commission also added new application note 16 to U.S.S.G. § 2F1.1. Among other things, this application note encourages upward departures in cases involving serious non-economic harm to victims of identity theft. As examples, the commission cited scenarios in which a person's credit record is harmed, or in which a person is erroneously denied a job or arrested because someone else has committed crimes using her or her name.<sup>51</sup> These provisions correspond directly to the Congressional directive in the ITADA.

**Additional amendments.** In other amendments, the commission imposed increased penalties for bankruptcy fraud (Amendment 597); heightened the penalties for cases involving sexual abuse of minors, particularly where the victim is solicited over the Internet (Amendment 592); ratified a previous amendment which imposed higher penalties for certain crimes involving telemarketing (Amendment 595); stiffened the penalties for drug crimes involving methamphetamines (Amendment 594); and clarified the interplay of complicated sentencing provisions in firearms offenses (Amendments 598-601).

## II. Emergency Amendments Issued After November 2000

**Dramatically increased penalties for ecstasy.** In recent months, ecstasy has emerged as a "hot button" issue in the ongoing national debate over drug abuse. Featured recently on the cover of the *New York Times Magazine*, ecstasy has become increasingly attractive to many young people, and has also drawn heightened attention from law enforcement. In the first nine months of 2000, the Customs Service seized over 9 million tablets of ecstasy — a huge increase over 1997, when just 500,000 tablets were seized in an entire year. In late 2000, responding to the surge in ecstasy abuse, Congress enacted the Ecstasy Anti-Proliferation Act of 2000.<sup>52</sup> Finding that ecstasy "can cause long-lasting, and perhaps permanent" damage to the brain, and expressing alarm that ecstasy traffickers are specifically targeting young people, Congress directed the sentencing commission to increase the penalties for trafficking in this substance.<sup>53</sup>

In January 2001, the sentencing commission responded to

Congress' mandate by announcing proposed emergency amendments that would dramatically increase the penalties for offenses involving ecstasy. The sentencing commission's initial proposal would have equated ecstasy with heroin on the drug equivalency tables. Thus, whereas under prior law a case involving 11,000 pills of ecstasy would result in a five-year sentence, the initial proposed amendment mandated this sentence for only 400 pills.<sup>54</sup> On March 20, 2001, after receiving extensive public comments, the commission adopted a revised amendment under which 800 pills would yield a five-year sentence.<sup>55</sup> The commission is scheduled to vote to make the amendment permanent on April 6, 2001. The amendment is slated to become effective on May 1, 2001, which then begins Congress' 180-day review period, after which, if Congress does not seek changes, it will become final and effective on November 1, 2001.

**Increased penalties for amphetamines and methamphetamines.** The changing pattern of narcotics trafficking continues to affect other drug penalty guidelines. Amphetamines and methamphetamines have been around much longer than ecstasy, but they, too, have attracted heightened attention from law enforcement in recent years. The upgraded enforcement effort has been prompted, in part, by the serious risks of bodily harm and environmental disaster associated with the manufacture of amphetamines and methamphetamines. These substances are commonly manufactured in clandestine laboratories — which are sometimes located in residential neighborhoods — using a variety of toxic chemicals which are volatile and explosive under certain conditions.

In the fall of 2000, Congress enacted the Methamphetamine and Anti-Proliferation Act, which contained two specific directives to the Sentencing Commission.<sup>56</sup> In response to the first directive, the commission adopted emergency Amendment 608, which became effective on December 16, 2000. This amendment imposes a three-level increase, and a minimum offense level of 27, for methamphetamine or amphetamine manufacturing cases where the offense creates a substantial risk of harm to human life or the environment. (Even greater penalties apply if the offense jeopardizes the life of a minor or an incompetent person.)<sup>57</sup> Subsequently, in February 2001, the commission responded to the second Congressional directive<sup>58</sup> by voting to adopt an emergency amendment that will equalize the penalty provisions for cases involving amphetamines and methamphetamines. Under current law, methamphetamine offenses are punished more harshly than crimes involving amphetamines, but the new amendment will eliminate the disparity. This amendment is scheduled to take effect on May 1, 2001.<sup>59</sup>

**Emergency amendment for human trafficking offenses.** In addition, the commission voted in February 2001 to issue an emergency amendment in response to the Victims of Trafficking and Violence Protection Act of 2000.<sup>60</sup> This amendment, which will become effective on May 1, 2000, imposes heightened penalties for crimes such as peonage, involuntary servitude, and use of false immigration documents in furtherance of such offenses.

### III New Proposed Amendments

In addition to the foregoing, the Sentencing commission has recently announced 23 proposed non-emergency amendments.<sup>61</sup> The text of these provisions spans more than 200 pages. Until recently, the commission was still accepting public comments on these new proposals. In this section, we will briefly summarize three of the more interesting, and potentially significant, proposed amendments.

**The “Economic Crimes Package.”** Perhaps the most important of the recently proposed amendments is the Commission’s “Economic Crimes Package.”<sup>62</sup> This far-reaching proposal, which is the result of years of study, would cause significant changes in the treatment of virtually all white-collar offenses. The proposal contains three different components: (1) consolidation of the guidelines for theft, fraud, and property destruction into a single, overarching guideline; (2) revision of the loss table to provide for greater spacing, and two-level increases in the offense level, as the amount of the loss goes up; and (3) important revisions in the definition of “loss.” Each of these changes would be noteworthy.

Because of the complexity of the economic crimes package, and its preliminary nature — on some important issues, the commission has outlined two or even three entirely separate approaches — detailed analysis is beyond the scope of this article. As some commentators have already noted, however, certain aspects of the package are questionable. For example, notwithstanding the commission’s stated desire to reduce the importance of fine distinctions in the calculation of loss, the introduction of two-level increments in the loss table will only *highlight* the significance of loss calculations in “borderline” cases (*i.e.*, where the loss figure is near one of the dividing points in the table).<sup>63</sup> Similarly, although the commission has not expressed an intention to stiffen the penalties for economic crimes, its new proposals would tend to have that effect in certain cases.<sup>64</sup>

**Revision of the sentencing table to permit home confinement and split sentences at higher offense levels.** In an apparent effort to promote non-incarceratory sentences for offenders who lack a significant criminal history, the commission has proposed expansions of Zones B and C of the sentencing table.<sup>65</sup> Whereas currently a sentencing court is required to impose a full sentence of imprisonment for any defendant with an offense level of 13 or higher,<sup>66</sup> the proposed amendment would allow the court to impose a “split sentence” (*i.e.*, half in prison, half in home confinement) for first offenders up to offense level 16. Thus, unlike current law, which requires that 100% of the sentence be served in prison for ranges beginning at 12-18 months, the amendment would permit a split sentence for a first offender with a sentencing range as high as 21-27 months. No less significantly, the threshold for Zone B (which permits the court to avoid any imprisonment at all and, instead, to impose 100% of the sentence in home confinement), would be raised, under the proposed amendment, from offense level 10 to offense level 12. This would allow defendants

who facing a sentencing range of 10-16 months to avoid serving any jail time.

Given the large number of cases that tend to hover around offense levels 10-16, we believe this proposal, if adopted, will have major effects on federal sentencing. Many defendants will avoid serving a sentence of imprisonment, and lawyers may find it easier to reach plea agreements in affected cases. On the other hand, the proposed amendment seems in tension with “truth in sentencing,” which was a major animating purpose of the sentencing guidelines,<sup>67</sup> as defendants who are ostensibly facing more than two years in prison may, in fact, spend substantially less time behind bars. The amendment would also reduce the incarceration rate for white collar offenders, which is in conflict with one of the original purposes of the guidelines.<sup>68</sup> Finally, retroactive application of this amendment could result in unfairness, as some defendants would be eligible for sentence reductions but others, whose sentences may recently have expired, would not.

**Expansion of the “safety valve” in narcotics cases.** The “safety valve” statute allows first offenders to avoid mandatory minimum sentences in drug cases if they: (a) did not have a managerial role; (b) did not possess a gun or use violence; and (c) truthfully provide information about the offense to the government.<sup>69</sup> Persons who qualify for the “safety valve” can also obtain a two-level reduction in the guidelines offense level.<sup>70</sup> Under present law, however, the two-level guidelines reduction for the “safety valve” is available only if the offense level is at least 26.

The commission has now proposed to make the two-level reduction available in all cases, regardless of the offense level.<sup>71</sup> The proposed change is both fair and sensible. Paradoxically, first offenders in relatively small-scale cases sometimes feel that they are forced to trial because of severe sentencing exposure and because of the fact that, because of their limited role, they have little or nothing to offer by way of cooperation. In our view, the proposed amendment would help ameliorate this situation.

### Notes

<sup>1</sup> Messrs. Zabel and Benjamin are litigation partners at Akin, Gump, Strauss, Hauer & Feld, L.L.P. and former Assistant U.S. Attorneys in the Southern District of New York. While at the U.S. Attorney’s Office, Mr. Zabel was Chief of the Narcotics Unit and Mr. Benjamin was Deputy Chief Appellate Attorney.

<sup>2</sup> See Rovella, *Sentencing Body To Get Nominees: Vacancies Cloud Guidelines, Leading To Disparities*, Nat’l L.J. (June 7, 1999); U.S. Sentencing Commission, *Report of the United States Sentencing Commission To The Judicial Conference Of The United States* (Sept. 1999); U.S. Sentencing Commission, *1999 Annual Report*, at vii-viii.

<sup>3</sup> U.S.S.G. App. C Supp., at 29-84 (2000).

<sup>4</sup> U.S.S.G. 2000 Guidelines Manual Supp., at 22-26 (2000).

<sup>5</sup> See U.S.S.G., Ch. 1 Pt. A, § 4(a); see also Breyer, *The Federal Sentencing Guidelines And The Key Compromises Upon Which They Rest*, 17 Hofstra L. Rev. 1, 8-12 (1988).

- <sup>6</sup> See U.S.S.G., App. A intro. comment. (1998).
- <sup>7</sup> *United States v. Elefant*, 999 F.2d 674, 675-77 (2d Cir. 1993).
- <sup>8</sup> See, e.g., *United States v. McCall*, 915 F.2d 811, 814 (2d Cir. 1990); *United States v. Brunson*, 882 F.2d 151, 157 (5th Cir. 1989).
- <sup>9</sup> U.S.S.G. App. C Supp., at 29-31 (Amend. 591) (2000).
- <sup>10</sup> See U.S.S.G. § 1B1.2(a) (2000); U.S.S.G. § 1B1.2, comment. (n.1) (2000).
- <sup>11</sup> In a recent decision, the Second Circuit affirmed the continuing vitality of Application Note 14, notwithstanding the November 2000 amendments. *United States v. Kurtz*, 2000 WL 8405 (2d Cir. Jan. 3, 2001).
- <sup>12</sup> U.S.S.G. App. C Supp., at 83-84 (Amend. 607) (2000).
- <sup>13</sup> See 18 U.S.C. § 3582(c)(2); U.S.S.G. § 1B1.10(a).
- <sup>14</sup> See U.S.S.G. § 6B1.4(d).
- <sup>15</sup> Compare *United States v. Baird*, 109 F.3d 856 (3d Cir.), cert. denied, 522 U.S. 898 (1997) with *United States v. Lawton*, 193 F.3d 1087 (9th Cir. 1999); see also U.S.S.G. App. C Supp., at 79 (collecting cases).
- <sup>16</sup> See, e.g., *United States v. Lawton*, 193 F.3d at 1092.
- <sup>17</sup> U.S.S.G. App. C Supp., at 78-79 (Amend. 604) (2000).
- <sup>18</sup> *Id.*; see generally 18 U.S.C. § 3661; U.S.S.G. § 1B1.4; U.S.S.G. Ch. 6, Pt. B, intro. comment.; U.S.S.G. § 6B1.4, comment.
- <sup>19</sup> See Fed. R. Crim. P. 11(e)(1)(C); Fed. R. Crim. P. 11(e)(4); see also Fed. R. Crim. P. 11, Adv. Comm. Notes, 1999 Amendment.
- <sup>20</sup> See U.S.S.G. Ch. 1, Pt. 4(d) (1987).
- <sup>21</sup> *Id.*
- <sup>22</sup> See *Zecevic v. United States Parole Comm'n*, 163 F.3d 731, 733 (2d Cir. 1998) (collecting cases on each side of the circuit split, including leading Seventh and Ninth Circuit cases).
- <sup>23</sup> U.S.S.G. § 5K2.20 (2000).
- <sup>24</sup> U.S.S.G. § 5K2.20, comment. (n. 1 & 2) (2000).
- <sup>25</sup> U.S.S.G. App. C Supp., at 77 (Amend. 603) (2000).
- <sup>26</sup> See 28 U.S.C. § 994(k).
- <sup>27</sup> See U.S.S.G. App. C Supp., at 75. For a case presenting a strong example of rehabilitation, see *United States v. Rodriguez*, 724 F. Supp. 1118 (S.D.N.Y. 1989).
- <sup>28</sup> See U.S.S.G. App. C Supp., at 74-75 (2000) (collecting cases).
- <sup>29</sup> See *United States v. Sims*, 174 F.3d 911 (8th Cir. 1999). A dissenting judge in the D.C. Circuit also adopted this view. See *United States v. Rhodes*, 145 F.3d 1375, 1384 (D.C. Cir. 1998) (Silberman, J., dissenting).
- <sup>30</sup> *United States v. Sims*, 145 F.3d at 911-12.
- <sup>31</sup> U.S.S.G. App. C Supp., at 74-75 (Amend. 602) (2000).
- <sup>32</sup> U.S.S.G. App. C Supp., at 75 (2000).
- <sup>33</sup> See 17 U.S.C. § 506(a); 18 U.S.C. §§ 2318-20; see generally *United States v. LaMacchia*, 871 F. Supp. 535, 539-40 (D. Mass. 1994).
- <sup>34</sup> No Electronic Theft (NET) Act, Pub. L. No. 105-147, § 2, 111 Stat. 2678, 2680 (Dec. 16, 1997).
- <sup>35</sup> U.S.S.G. App. C Supp., at 51-56 (Amend. 593) (2000).
- <sup>36</sup> See U.S.S.G. § 2B5.3(b)(1) (2000); U.S.S.G. § 2B5.3, comment (n.2) (2000).
- <sup>37</sup> U.S.S.G. App. C Supp., at 54-55 (2000).
- <sup>38</sup> U.S.S.G. § 2B5.3(b)(2) (2000).
- <sup>39</sup> U.S.S.G. App. C Supp., at 55 (2000).
- <sup>40</sup> U.S.S.G. § 2B5.3, comment. (n.4) (2000).
- <sup>41</sup> In 1996, 107 cases were sentenced under § 2B5.3; by 1998, the number had grown to 137. U.S. Sentencing Commission, *Testimony Before The Courts And Intellectual Property Subcommittee Of The House Judiciary Committee* (May 12, 1999). By contrast, according to the Administrative Office of the U.S. Courts, 57,691 criminal cases were filed, nationwide, in 1998. Mecham, *Judicial Business of the United States: 1999 Annual Report of the Director*, at 16 (1999).
- <sup>42</sup> See U.S. Sentencing Commission, *No Electronic Theft Act: Policy Development Team Report*, at 2 (Feb. 1999) (discussing purpose and implications of NET Act); see also NET Act, Pub. L. No. 105-147, § 2, 111 Stat. 2678 (Dec. 16, 1997).
- <sup>43</sup> Pub. L. No. 105-318, 112 Stat. 3007 (Oct. 30, 1998).
- <sup>44</sup> See *id.* § 3; see also 18 U.S.C. §§ 1028(a)(7), 1028(d)(3).
- <sup>45</sup> See U.S. Sentencing Commission, *Identity Theft: Final Report*, at 3-4, 9 (Dec. 15, 1999).
- <sup>46</sup> See ITADA, Pub. L. No. 105-318, § 4, 112 Stat. 3007, 3009-10 (Oct. 30, 1998).
- <sup>47</sup> See Wireless Telephone Protection Act, Pub. L. No. 105-172, §2, 112 Stat. 53, 55 (Apr. 24, 1998).
- <sup>48</sup> U.S.S.G. App. C Supp., at 59-65 (Amend. 596) (2000).
- <sup>49</sup> U.S.S.G. § 2F1.1(b)(5)(C) (2000).
- <sup>50</sup> U.S.S.G. App. C Supp., at 65.
- <sup>51</sup> See U.S.S.G. § 2F1.1, comment. (n. 16) (2000).
- <sup>52</sup> Pub. L. No. 106-310, § 3661 *et seq.*, 114 Stat. 1241 (Oct. 17, 2000).
- <sup>53</sup> *Id.* §§ 3662-63, 114 Stat. 1241-43.
- <sup>54</sup> U.S. Sentencing Commission, Volume Two; Proposed Amendments to The Sentencing Guidelines, at 102 (Proposed Amend. 1) (Jan 24, 2001).
- <sup>55</sup> Statement of Diana E. Murphy, Chair of the United States Sentencing Commission Before the Senate Caucus on International Narcotics Control, March 21, 2001.
- <sup>56</sup> See Pub. L. No. 106-310, § 3601 *et seq.*, 114 Stat. 1227 (Oct. 17, 2000).
- <sup>57</sup> U.S.S.G. Supp. to App. C Supp. (Amend. 608) (2000).
- <sup>58</sup> See Pub. L. No. 106-310, § 3611, 114 Stat. 1228 (Oct. 17, 2000).
- <sup>59</sup> U.S. Sentencing Commission, press release, "Sentencing Commission Seeks To Increase Penalties For Counterfeiting And Amphetamine Offenses" (March 1, 2001).
- <sup>60</sup> Pub. L. No. 106-38, 114 Stat. 1464 (Oct. 28, 2000).
- <sup>61</sup> See U.S. Sentencing Commission, Volumes One and Two: Proposed Amendments to the Sentencing Guidelines (Jan. 24, 2001).
- <sup>62</sup> U.S. Sentencing Commission, Volume Two: Proposed Amendments to the Sentencing Guidelines, at 77 (Proposed Amend. 12) (Jan. 24, 2001).
- <sup>63</sup> See Liman, "The Sentencing Commission's 'Economic Crime Package' Proposal," *New York Law Journal* (March 8, 2001).
- <sup>64</sup> See *id.*
- <sup>65</sup> U.S. Sentencing Commission, Volume Two: Proposed Amendments to the Sentencing Guidelines, at 162 (Proposed Amend. 14) (Jan. 24, 2001)
- <sup>66</sup> U.S.S.G. Ch. 5, Pt. A, U.S.S.G. § 5C1.1
- <sup>67</sup> See U.S.S.G., Ch. 1, Pt. 3.
- <sup>68</sup> See *supra* n. 19.
- <sup>69</sup> See 18 U.S.C. § 3553(f).
- <sup>70</sup> See U.S.S.G. § 2D1.1(b)(6).
- <sup>71</sup> U.S. Sentencing Commission, Volume Two: Proposed Amendments to the Sentencing Guidelines, Proposed Amend. 9, at 71-73 (Jan. 24, 2001).

## About the Authors

**Richard B. Zabel** is a partner in the litigation and technology practice groups of Akin, Gump, Strauss, Hauer & Feld, L.L.P. in New York. Mr. Zabel focuses on white collar criminal defense, corporate investigations, complex civil litigation and appeals. He has litigated and investigated criminal and civil high-technology matters, and advises on criminal matters under the Economic Espionage Act, the Computer Fraud and Abuse Act, and the Electronic Communications Privacy Act. Before joining Akin Gump, Mr. Zabel served for eight years as a federal prosecutor in the U.S. Attorney's Office for the Southern District of New York. During his tenure there, he prosecuted a variety of cases involving securities fraud, obstruction of justice, racketeering, firearms, and narcotics charges, and argued numerous cases before the U.S. Court of Appeals for the 2nd Circuit. Mr. Zabel was chief of the Narcotics Unit at the U.S. Attorney's Office and has received numerous awards, including the Attorney General's Award for Distinguished Service and the Department of Justice Director's Award for Superior Performance as an Assistant U.S. Attorney.

For additional information on this topic, please contact him at 212.872.8060 or at [rzabel@akingump.com](mailto:rzabel@akingump.com).

**James J. Benjamin Jr.** is a partner in the litigation practice group in the New York office of Akin, Gump, Strauss, Hauer & Feld, L.L.P. Mr. Benjamin focuses on white collar criminal defense and civil litigation, including trial and appellate work. He has extensive experience with investigations and litigation under the federal securities laws, including allegations of insider trading, accounting fraud, fraudulent offerings of securities and market manipulation. He has also handled numerous federal criminal cases brought under a variety of other statutes including money laundering, obstruction of justice, mail and wire fraud, and bank fraud. Before joining Akin Gump, Mr. Benjamin served for five years as a federal prosecutor in the U.S. Attorney's Office for the Southern District of New York. During his tenure there, he served as deputy chief appellate attorney. He has conducted numerous jury trials and has briefed and argued many cases before the U.S. Court of Appeals for the 2nd Circuit. As an assistant U.S. attorney, he received an award for superior performance from Attorney General Janet Reno in 2000. Before joining the U.S. Attorney's Office, Mr. Benjamin served as a law clerk at the U.S. Supreme Court for the Honorable Lewis F. Powell Jr.

For additional information on this topic, please contact him at 212.872.8091 or at [jbenjamin@akingump.com](mailto:jbenjamin@akingump.com).



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